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THE NATURE OF LEGISLATIVE INTENT

Richard Ekins

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Series Editors' Preface

Richard Ekins' book is a sustained argument for a well-integrated set of views: that a legislature is a rational agent, that it acts intentionally when it legislates, and that the task of the interpreter is to give effect to that intention. The intention in question is to adopt a reasoned proposal for law making. It is, in fact, the 'interlocking' intention of all the members of the legislature–to act on the reasoned proposal if the majority votes for it. It is a complex intention because it necessarily involves, in Ekins' view, the reasoning behind the proposal.

The result is an original work on the nature and effect of legislation. It has roots in political philosophy and in the philosophy of mind and of language. It presents elements of an account of the nature of law, drawn from the tradition of natural law theory and given new elaboration. The implications of the argument for the theory of interpretation are set out with Ekins' characteristic directness and clarity.

To some it has seemed that a legislature cannot act intentionally, because it is an assembly of individuals who have different intentions, and has no mind of its own. To others it has seemed that the legislature's law making power is simply to enact a text, and that the intention to do so offers no assistance to the interpreter who must determine the meaning of the text. Ekins responds to these theories of legislation with verve, arguing that they entail that legislating is collectively irrational.

The book puts central issues, long debated, in a new perspective. It is a step forward in legal philosophy, when you discover that a

controversial position has more to it than you had thought. Readers who disagree with Ekins have that discovery in store.

This book will raise the standard of debate about the making and interpretation of legislation. It will also create new debates. We are delighted to publish Richard Ekins' book in *Oxford Legal Philosophy*.

Timothy Endicott
John Gardner
Les Green
August 2012

The Cover Picture

Althing in Session; oil on canvas by W G Collingwood (1897)

The Althing, the central institution of the Icelandic Commonwealth (930AD–1262AD), was a general assembly of the nation, in which the goðar (chieftains) met to settle disputes and to make new law. All free men were entitled to attend, and assemblies, held for two weeks in mid-summer, drew large numbers of farmers, traders, craftsmen, and storytellers, as well as quarrelling parties. The Althing met at Thingvellir, a magnificent rift valley some 45km east of what is now Reykjavík, and was formally opened and adjourned at Lögberg (law rock) by the assembly's presiding officer, the Lawspeaker.

At the Althing, laws were made and unmade by the Lögrétta (or law council), which consisted of the goðar and the Lawspeaker. The Lögrétta appointed the Lawspeaker, the only paid official of the Commonwealth, for a three-year term. At each assembly, he recited the procedural law of the Althing and one third of the substantive laws then in force. In Collingwood's painting, the Lawspeaker stands on the Lögberg, surrounded by goðar and others, perhaps reciting the law or opening or adjourning the Althing. In the foreground are two booths, stone structures tented over as dwelling or meeting places. From the Lögberg, the members of the Lögrétta would have moved down the slope seen on the left of the painting, to meet in a circular stone platform, the remains of which were discovered in 1742.

Collingwood spent three months in Iceland in the summer of 1897. He recorded his journey in *A Pilgrimage to the Saga-Steads of Iceland* (1899, with Jón Stefánsson), which included over 150 sketches intended, as the Preface says, 'to illustrate the sagas of Iceland . . . to supply the background of scenery which the ancient dramatic style takes for granted'.

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List of Abbreviations

Aquinas	J Finnis, *Aquinas: Moral, Political, and Legal Theory* (Oxford University Press, Oxford, 1998)
BAI	J Raz, *Between Authority and Interpretation: On the Theory of Law and Practical Reason* (Oxford University Press, Oxford, 2009)
BST	F A R Bennion, *Bennion on Statutory Interpretation*, 5th edn (LexisNexis, London, 2008)
ILT	A Marmor, *Interpretation and Legal Theory* (Oxford University Press, Oxford, 1992)
LD	J Waldron, *Law and Disagreement* (Clarendon Press, Oxford, 1999)
LE	R Dworkin, *Law's Empire* (Hart, Oxford, 1998)
NLNR	J Finnis, *Natural Law and Natural Rights* (Clarendon Press, Oxford, 1980)
ST	*Summa Theologica of St Thomas Aquinas* [A Summary of Theology]

Contents

1

Introduction

Legislatures enact statutes, the enactment of which (somehow) changes the law. Judges and lawyers, in interpreting a statute—adjudging its meaning and determining its lawmaking effect—very often try (and say that they are trying) to identify the legislature's intentions in enacting it. That is, they try (and say that they are trying) to reach a conclusion about what were or were not the meanings the legislature intended to convey and/or the ends (or purposes) it intended to pursue by means it intended to be followed. This *legislative intent* has traditionally been thought to be the central object of statutory interpretation. Much public discourse, too, takes for granted that the legislature is capable of forming and acting on intentions. This book elucidates the nature of legislative intent, explaining how and why the institution forms and acts on intentions. It shows intention's justified centrality in the very idea of having a legislature and recognizing acts of legislating, and in the historic and reasonable practice of statutory interpretation.

The central importance of legislative intent is defended by theorists as diverse as Aquinas and Hobbes. Transmitting one-and-a-half millennia of philosophical and juristic tradition, Aquinas taught that the adoption of laws requires the judge like anyone else to comply not with their letter (their wording) so much as with their maker's intentions.[1] Hobbes maintained that 'it is not the letter, but the intendment, or meaning; that is to say, the authentic interpretation of the law (which is the sense of the legislator), in which the nature of the

[1] Aquinas, *ST*, I–II q. 91 a. 1c, I–II q. 96 a. 6, and II–II q. 60 a. 5 ad 2; see further Finnis, *Aquinas*, 255–8, especially n 19.

law consisteth'.[2] And that was the position of great masters of English law, with Blackstone, to take just one instance, arguing that:

> The fairest and most rational method to interpret the will of the legislator, is by exploring his intentions at the time when the law was made, by *signs* the most natural and probable. And these signs are either the words, the context, the subject matter, the effects and consequence, or the spirit and reason of the law.[3]

Today the leading English text on statutory interpretation states in no uncertain terms that:

> An enactment has the legal meaning taken to be intended by the legislator. In other words the legal meaning corresponds to the legislative intention . . . [T]he function of the court is to find out and declare that intention [which] is the paramount, indeed only ultimate, criterion.[4]

Among countless judicial affirmations of this position, many emphasize *expressed* intention: 'The duty of the courts is to ascertain and give effect to the will of Parliament as expressed in its enactments'.[5] 'There are many so-called rules of construction that courts of law have resorted to in their interpretation of statutes, but the paramount rule remains that every statute is to be expounded according to its manifest or expressed intention.'[6] So some scholars contrast expressed with unexpressed or *subjective* intention,[7] a distinction I will consider and contest. What remains striking is the judicial willingness to declare legislative intent the central object of interpretive practice. At the end of a far-reaching set of comparative studies of statutory

[2] T Hobbes, *Leviathan*, ed A Martinich (Broadview Press, Peterborough, 2005) chapter XXVI ('On civil law').

[3] W Blackstone, *Commentaries on the Laws of England* (Oxford, 1765–9) cited to 9th edn (1783), the last revised by Blackstone, Book I, 59.

[4] Bennion, *BST*, 469.

[5] *Corocraft v Pan-Am* [1969] 1 QB 616 at 638, per Donaldson MR.

[6] *Attorney-General for Canada v Hallett & Carey Ltd* [1952] AC 427 at 449, per Lord Radcliffe.

[7] A Kavanagh, 'The Role of Parliamentary Intention in Adjudication under the Human Rights Act 1998' (2006) 26 Oxford Journal of Legal Studies 179, 181–3; J Manning, 'Textualism and Legislative Intent' (2005) 91 Virginia Law Review 419, 425–6.

interpretation, MacCormick and Summers observe that argument from intention is a central, trans-categorical type of interpretive argument in all systems[8]—trans-categorical because it informs and is informed by other types, which they term linguistic, systemic, or teleological/evaluative.[9] MacCormick and Summers note various tensions in the way legislative intent is understood in various legal systems and they are themselves somewhat sceptical about the idea's coherence or relevance.[10] Still, they emphasize that it is pervasive, even ubiquitous, in interpretive practice.

But all this is under challenge. Many judges, 'conservatives' and 'progressives' alike, and many scholars now doubt or flatly deny that the institution itself has intentions, reasoning that the modern legislature is typically an assembly of legislators rather than one legislator. Justice Scalia of the United States Supreme Court is a well-known sceptic.[11] Judges in New Zealand,[12] Australia, and the United Kingdom[13] have also all expressed doubts. For example, Michael Kirby, a Justice of the Australian High Court, writes:

> So far as Acts of Parliament are concerned, it is unfortunately still common to see reference in judicial reasons and scholarly texts to the 'intention of Parliament'. I never use that expression now. It is potentially misleading. In Australia, other judges too regard the fiction as unhelpful. It is difficult to attribute an 'intention' of a document such as a statute. Typically, it is prepared by many hands and submitted to a decision-maker of many different opinions, so that to talk of a single 'intention' is self-deception.[14]

[8] D N MacCormick and R S Summers, 'Interpretation and Justification', chapter 13 in D N MacCormick and R S Summers (eds), *Interpreting Statutes: A Comparative Study* (Dartmouth Press, Aldershot, 1991), 511, 515 and 522–5.

[9] MacCormick and Summers (n 8) 512–21.

[10] D N MacCormick, 'Coherence in Legal Justification' in A Peczenik, L Lindhal, and G van Roermund (eds), *Theory of Legal Science* (Reidel Publishing Co, Boston, Dordrecht, 1984), 235, 240.

[11] A Scalia, *A Matter of Interpretation: Federal Courts and the Law*, A Gutmann (ed) (Princeton University Press, Princeton, 1998), 3, 16–23.

[12] K J Keith, *Interpreting Treaties, Statutes and Contracts* (Occasional Paper No 19, New Zealand Centre for Public Law, Wellington, 2009) 4–5; *R v Hansen* [2007] 3 NZLR 1 at [14], per Elias CJ; and New Zealand Law Commission, *A New Interpretation Act to Avoid 'Prolixity and Tautology'* (NZLC R17, 1990) at [73].

[13] J Steyn, '*Pepper v Hart*; A Re-examination' (2001) 21 Oxford Journal of Legal Studies 59.

[14] M Kirby, 'Towards a Grand Theory of Interpretation: The Case of Statutes and Contracts' (2003) 24 Statute Law Review 95, 98–9.

His speculation about other Australian judges now seems confirmed by the High Court's apparent consensus that legislative intent is a metaphor rather than a social fact.[15] These judicial qualms about and denials of the classic position rely in part on, and are echoed and extended in, scholarly scepticism. Cross for example argues that the expression 'the intention of Parliament' is 'not so much a description as a linguistic convenience',[16] for in truth '[o]nly human beings can really have intentions, purposes, or objects'.[17]

Much turns on whether legislative intent exists. The question plainly bears on the way in which judges and others interpret statutes. Should one aim to infer what the author(s) of the statute decided or intended? When, if ever, and on what grounds, may one depart from the literal or ordinary meaning of the statutory text? What place, if any, is there for 'purpose' in interpretation? How, if at all, may the statute's meaning or application change over time? The way in which we understand the nature of the legislature in general is also at stake. What should we expect of the institution? Is it an agent that responds to reasons with choice or is it a device—an arrangement or sort of machine—for producing outcomes? The nature of legislative intent informs how one should understand salient features of the legislative process (parties, offices), the character and point of the institution (representative, deliberative), and the duties of legislators. How one conceives of the institution frames political discourse, which in turn goes to questions about separation of powers, such as the grounds or scope of judicial review of legislation. My project is not to run all these implications to ground, but plainly the stakes are high.

The principal concerns about legislative intent which inform more recent judicial and scholarly scepticism are in fact not new. Gustav Radbruch argued in 1910 that it made no sense for statutory interpretation to centre on legislative intent, for:

> ... philological interpretation, striving to draw out of a mental creation the thought put into it by its creator, amounts to thinking about something

[15] *Momcilovic v The Queen* [2011] HCA 34 (8 September 2011).

[16] J Bell and G Engle (eds), *Cross on Statutory Interpretation*, 3rd edn (Butterworths, London, 1995), 28.

[17] Bell and Engle (n 16) 27. The quotes in the main text are found in the 1976 first edition, which was prepared by Cross himself. In the later editions, after his death, his editors add that 'an appeal to "the intention of Parliament" ... is used as a statement of attitude or approach, not as an element of social fact to be researched' (at 31).